CASE NO.:
Appeal (civil) 5665 of 2002
Appeal (civil) 5666 of 2002

PETITIONER:
Liverpool & London S.P. & I Asson. Ltd.

RESPONDENT:
M.V. Sea Success I & Anr.

DATE OF JUDGMENT: 20/11/2003

BENCH:
CJI & S.B. Sinha.

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

THE BACKGROUND FACT:

The appellant (Club) herein is an association incorporated under the laws of the United Kingdom. It is a mutual association of ship owners. It offers insurance cover in respect of the vessels entered with it for diverse third party risks associated with the operation and trading of vessels. According to the appellant, no vessel operates without a Protection & Indemnity (P&I) cover and the same has been made compulsory to allow a ship to enter major ports in India.

'Sea Ranger' and 'Sea Glory' are the sister vessels of the 1st respondent vessel and they are allegedly owned by the 2nd respondent. The first two vessels entered into a contract with the appellant's association for the years 1998-1999 and 1999-2000 but they have not paid the unpaid insurance premium due and payable by the 2nd respondent for various P&I risks for which they had been insured. These unpaid insurance calls being "necessaries" was enforceable within the "admiralty jurisdiction" of the Bombay High Court.

For the arrest of the 1st respondent vessel which came to Mumbai Port within the territorial waters of India, a suit was filed by the club inter alia for the prayers : "(a) for a decree against the respondents in the sum of US$1,18,194.89 together with interest at the rate of 12% per annum, which was the unpaid insurance premium amount due to the club and payable by the 2nd respondent; and (b) for arrest of the 1st respondent vessel to secure the claim."

On an application for arrest of the 1st respondent vessel having been made, the 2nd respondent appeared and undertook to furnish security in respect of the appellant's claim and further gave an undertaking that until the security is furnished the said vessel will not leave the Port of Mumbai. However, thereafter S.S. Shipping Corporation Inc., Liberia claiming to be the registered owner of the 1st respondent furnished a bank-guarantee in relation to the appellant's claim in discharge of the undertaking of security given by the second respondent. The 1st respondent thereafter took out a Notice of Motion for rejection of the plaint purported to be under Order 7 Rule 11(a) of the Code of Civil Procedure inter alia on the ground that the averments contained therein do not disclose a cause of action as the claim of unpaid insurance premium was not a "necessary" within the meaning of Section 5 of the

Admiralty Courts Act, 1861. A learned Single Judge of the High Court after hearing the Notice of Motion by an order dated 1-2/2/2001 referred the said question to a Division Bench as it could not agree with a decision rendered by another learned Single Judge. However, on the other two grounds it discharged the Notice of Motion holding that the averments made in paragraphs 1 and 14 of the plaint inter alia to the effect that all the three ships are beneficially owned by the 2nd respondent disclose a cause of action.

An appeal thereagainst was preferred by the respondent herein. The Division Bench took up the appeal preferred by the respondent herein as also the reference made by the learned Single Judge and passed a common judgment.

ISSUES :

The questions which arose for consideration before the High Court were:

(i) whether arrears of insurance premium due and payable to the appellant by the 2nd respondent would fall within the scope and ambit of Section 5 of the Admiralty Courts Act, 1861;
(ii) whether refusing to reject the plaint under Order 7 Rule 11(a) upon holding that the plaint discloses a cause of action is a 'judgment' within the meaning of Clause 15 of the Letters Patent of the Bombay High Court and was, thus, appealable; and
(iii) Whether the averments made in paragraphs 1 and 14 of the plaint disclose sufficient cause of action for maintaining a suit.

The Division Bench while answering the question No. 1 in favour of appellant, answered question Nos. 2 and 3 against it. Appeal No. 226 of 2001 has been filed by the 'club' whereas Civil Appeal No. 5666 of 2002 has been filed by the 'vessel'.

Submissions :

Mr. Bharucha, the learned counsel appearing on behalf of the "Vessel" would inter alia submit:

(i) The amount of arrears of insurance premium alleged to be due to the 1st respondent towards release calls is not a maritime claim entitling the Club to invoke the admiralty jurisdiction of the High Court as such unpaid insurance money does not constitute 'necessaries' within the meaning of Section 5 of the Admiralty Courts Act, 1861.
(ii) Sufficiently direct and proximate connection between insurance and the vessel is a prerequisite for bringing an action in rem. Insurance is meant primarily as a means of indemnifying and protecting the vessel owner against the loss of his vessel and/or claims that that may arise as a result of damage or loss caused by the vessel. Although it may be a commercial necessity but the same would not come within the purview of the term 'necessaries' within the meaning of the provisions of the said Act. The provisions contained in the Admiralty Courts Act of 1840 and 1861, Section 22 of the Supreme Court of Judicature Act, 1925, the 1952 Brussels Arrest Convention as also the Administration of Justice Act, 1956 disclose one uniform feature that in order that a monetary claim qualifies for and is recognized as a maritime claim the same must be necessary for operation of the ship.
(iii) In United Kingdom, it has consistently been held for more than a century that unpaid insurance premium is not a "necessary" within the conventional meaning of the said term as understood in maritime law. The said view has been reiterated by the Courts of Australia, South Africa and Singapore. In support of

the said contention, strong reliance has been placed on Queen Vs. Judge of the City of London Court [1891 1 QB 273], The Beldis [1936 P. 51], Webster Vs. Seekamp [1821 4B & Ald 352], Heinrich Bjorn [1883 8 P.D. 151], The Andre Theodore [10 Aspinall 94], Stokes Vs. The Conference [1887 (8) NSWR 10], The River Rima [1988 2 L Rep 193], a South African Court decision in The Emerald Transporter [1985 2 SALR 152] as also a decision of Singapore High Court in The Golden Petroleum [1994 1 SLR 92].

(iv) The expression "necessaries supplied to any ship" although has not statutorily been defined; over a long period of time, the same had attained a definite connotation, i.e., goods or services supplied to a specifically identified ship in order to successfully prosecute the voyage in question, and, thus, applying the said test unpaid insurance premium does not answer the said definition. The matter has furthermore to be looked at from the point of view of physical necessity and practicality and not from the viewpoint of prudence or sound economics.

(v) There are a large number of categories of insurance from hull and machinery insurance, to protection and indemnity (P&I) cover, through war risks, to freight demurrage and defence cover (FD&D), oil spill cover (TOVALOP), and strike cover etc and in that view of the matter if P&I should be held to be a necessary, others are not, the same would lead to an incongruous situation.

(vi) In view of the decision in The Aifanourious [1980 2 L Reps. 403] as also the decision rendered by the House of Lords in Gatoil International Inc. Vs. Arwkright Boston Manufacturers Mutual Insurance Co. & Other The Sandrina [1985 (1) All ER 129], holding that claim for unpaid insurance has never been recognized as maritime claim under any other head and the Courts of England expressly held the same to have been excluded as such under Article 1 of the Brussels Arrest Convention, 1952. Such a claim, thus, due to unpaid insurance premium would not be a maritime claim also under the head "disbursements made on account of a ship".

(vii) In the decision of this Court in M.V. Elisabeth [(1993) Supp. 2 SCC 433], it was merely held that the High Courts in India will have an extended jurisdiction under the Admiralty Courts Act, 1861 and the said principle cannot be further extended.

(viii) As the maritime jurisdiction of the High Courts in India was derived from the pre-independence statutes and as the High Courts of India exercise the same jurisdiction as that of the courts in England, it must necessarily be held that the interpretation of the word "necessaries" rendered by the English Courts and which has been followed by other courts except by the American Court should prevail.

Mr. Prashant S. Pratap, the learned counsel appearing on behalf of the Club, on the other hand, would submit that:

(i) "necessaries" are the things which a prudent owner would provide to enable a ship to perform the functions wherefor she has been engaged and, thus, the provision of services would come within the definition of necessaries.

(ii) The term "necessaries" must be construed in a broad and liberal manner keeping in mind the ever changing requirements of a ship to be able to trade in commerce.

(iii) Contemporary maritime statutes in England do not use the term "necessaries" but the American Federal Maritime Liens Act does and, thus, decision rendered by the American Courts that insurance is a "necessary" should be held to be correct. (Equilease Corp. Vs. M.V. Sampson 793 F.2d 598- U.S. Court of Appeals).

(iv) A valid P&I insurance cover is necessary for a ship to call at

major ports in India and consequently so far as India is concerned, it is a necessity having regard to the fact that Mumbai Port, JNPT and Kolkata Port have issued a statutory direction in this behalf.

(v) The domestic legislation in India also provide for a compulsory insurance. Reference in this connection has been placed on the Inland Vessels Act, 1917 (as amended in the year 1977), the Merchant Shipping Act, 1956 (as amended in 1983) and Multimodal Transportation of Goods Act, 1993 (as amended in 2000) and in that view of the matter the pedantic and regressive view should be discouraged specially in the light of the judgment of this Court in M.V. Elisabeth (supra).

(vi) By reason of the 1999 Arrest Convention inter alia unpaid insurance calls had been added and in absence of any codification and maritime claim by a statute in India the same should be taken into consideration for determination of the jurisdiction of the High Court. Several countries such as Canada, South Africa, Australia, China and Korea have given the claim for unpaid insurance premium in respect of a ship, the status of a maritime claim.

(vii) Flexibilities being the virtue of law court, the High Court has rightly held that the marine premium would come within the purview of the term "necessaries" having regard to the global change and outlook in trade and commerce. Reliance in this connection has been placed on M.V. Al Quamar Vs. Tsavliris Salvage (International) Ltd. & Ors. [(2000) 8 SCC 278].

STATUTORY PROVISIONS :

The relevant provisions of Admiralty Court Act, 1840 are as follows:

"3. WHENEVER A VESSEL SHALL BE ARRESTED, ETC., COURT TO HAVE JURISDICTION OVER CLAIMS OF MORTGAGEES: Whenever any ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the registry of the said court, in either such case the said court shall have full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively.

4. COURT TO DECIDE QUESTIONS OF TITLE, ETC.: The said Court of Admiralty shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages or bottomry, which shall be instituted in the said court after the passing of this Act.

6. THE COURT IN CERTAIN CASES MAY ADJUDICATE, ETC.: The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have

been within the body of a country, or upon the high seas, at the time when the services were rendered or damage received, or necessaries furnished, in respect of which such claim is made.

The relevant provisions of Admiralty Court Act, 1861 are as under:

"4. AS TO CLAIMS FOR BUILDING, EQUIPPING, OR REPAIRING OF SHIPS: The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the court.

5. AS TO CLAIMS FOR NECESSARIES: The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if in any such cause the plaintiff do not recover twenty pounds, he shall not be entitled to.

6. AS TO CLAIMS FOR DAMAGE TO CARGO IMPORTED: The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if any such cause the plaintiff do not recover twenty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court.

8. HIGH COURT OF ADMRILATY TO DECIDE QUESTIONS AS TO OWNERSHIP, ETC. OF SHIPS: The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit.

Section 2 of Colonial Courts of Admiralty Act, 1890 reads thus:

"2. Colonial Courts of Admiralty. - (1) Every

court of law in a British possession, which is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty....
(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

Section 2 of The Colonial Courts of Admiralty (India) Act, 1891 reads as under:

2. APPOINTMENT OF COLONIAL COURTS OF ADMIRALTY: The following Courts of unlimited civil jurisdiction are hereby declared to be Colonial Courts of Admiralty, namely:-

(1) the High Court of Judicature at Fort William in Bengal;
(2) the High Court of Judicature at Madras, and
(3) the High Court of Judicature at Bombay."

Section 22(1) of Supreme Court of Judicature (Consolidation) Act, 1925 reads thus:

"22. ADMIRALTY JURISDICTION OF HIGH COURT: (1) The High Court shall, in relation to admiralty matters, have the following jurisdiction (in this Act referred to as "admiralty jurisdiction") that is to say -

(a) Jurisdiction to hear and determine any of the following questions or claims:

*** *** ***

(viii) Any claim by a seaman of a ship for wages earned by him on board the ship, whether due under a special contract or otherwise, and any claim by the master of a ship for wages earned by him on board the ship and for disbursements made by him on account of the ship;
(ix) Any claim in respect of a mortgage of any ship, being a mortgage duly

registered in accordance with the provisions of the Merchant Shipping Acts, 1894 to 1923, or in respect of any mortgage of a ship which is, or the proceeds whereof are, under the arrest of the court;"

(x) Any claim for building, equipping or repairing a ship, if at the time of the institution of the proceedings the ship is, or the proceeds thereof are, under the arrest of the court."

Articles 1(k) and 2 of the 1952 Brussels Convention are as under:

"(1) "Maritime Claim" means a claim arising out of one or more of the following:

*** *** ***

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

2. A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim; but nothing in this Convention shall be deemed to extend or restrict any right or powers vested in any Governments or their Departments, Public Authorities, or Dock or Harbour Authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction."

HISTORY OF JURISDICTION OF THE HIGH COURT :

The jurisdiction of the High Court of Admiralty in England used to be exercised in rem in such matters as from their very nature would give rise to a maritime lien - e.g. collision, salvage, bottomry. The jurisdiction of the High Court of Admiralty in England was, however, extended to cover matters in respect of which there was no maritime lien, i.e., necessaries supplied to a foreign ship. In terms of Section 6 of the Admiralty Act, 1861, the High Court of Admiralty was empowered to assume jurisdiction over foreign ships in respect of claims to cargo carried into any port in England or Wales. By reason of Judicature Act of 1873, the jurisdiction of the High Court of Justice resulted in a fusion: of admiralty law, common law and equity. The limit of the jurisdiction of the Admiralty court in terms of Section 6 of the 1861 Act was discarded by the Administration of Justice Act, 1920 and the jurisdiction of the High Court thereby was extended to (a) any claim arising out of an agreement relating to the use or hire of a ship; (b) any claim relating to the carriage of goods in any ship; and (c) any claim in tort in respect of goods carried in any ship.

The admiralty jurisdiction of the High Court was further consolidated by the Supreme Court of Judicature (Consolidation) Act, 1925 so as to include various matters such as any claim "for damage done by a ship", and claim ’arising out of an agreement relating to the use or hire of a ship’; or ’relating to the carriage of goods in a ship’; or "in tort in respect of goods carried in a ship".

The admiralty jurisdiction of the High Court was further widened by the Administration of Justice Act, 1956 so as to include not only the claims specified under Section 1(i) of Part I but also any other jurisdiction which either was vested in the High Court of Admiralty immediately before the date of commencement of the Supreme Court of Judicature Act, 1873 (i.e. November 1, 1875) or is conferred by or under an Act which came into operation on or after that date on the High Court as being a court with admiralty jurisdiction and any other jurisdiction connected with ships vested in the High Court apart from this section which is for the time being assigned by rules of court to the Probate, Divorce and Admiralty Division.

Sub-Section (4) of Section 1 removed the restriction based on the ownership of the ship. By reason of Clauses (d) (g) and (h) of the said Section the jurisdiction in regard to question or claims specified under Section 1(i) included any claim for loss of or damage to goods carried in a ship, any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.

In the course of time the jurisdiction of the High Courts vested in all the divisions alike. The Indian High Courts after independence exercise the same jurisdiction.

NECESSARIES - AS A MARITIME CLAIM:

The concept "as to claims for necessaries" is specified under Section 5 of the Admiralty Court Act, 1861, which provides for the jurisdiction of High Court as regard "Necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of institution of the cause an owner or part owner of the ship is domiciled in England or Wales".

The term "necessaries" had not been defined in the Act of 1861. It was given a meaning by judicial pronouncements.

It stands accepted that having regard to the legislative and executive policy, England and Wales never considered the arrears of insurance premium as a 'necessary'. The Courts of England further maintained a distinction between a maritime claim and maritime lien. The decisions cited by Mr. Bharucha go to show that the English Courts proceeded on the premise that for the purpose of considering as to whether any necessary has been supplied to a ship or not must have a sufficient and direct connection with the operation of the ship. It held that unpaid insurance premium is not a maritime claim as it is not needed to keep it going. [See Queen Vs. Judge of the City of London Court (supra), Heinrich Bjorn (supra), The Andre Theodore (supra), The Aifanourious (supra). The English Courts, thus, refused to put a wide construction on that term.

A similar view was also adopted by an Australian High Court in Gould Vs. Cornhill Insurance Co. Ltd. [1 DLR 4th Ed. 183].

In The Riga [(1869-72) L.R. 3 A&E 516], it is stated:

"The definition of the term "necessaries" given by Lord Tenterden in Webster v. Seekamp (4 B. & Ald. 352) adopted and applied in proceedings in Admiralty. Semble, there is no distinction between necessaries for the ship and necessaries for the voyage."

In The Edinburgh Castle [(1999) Vol. 2 Lloyd's Law Reports 362], it has been held:

"To address these concerns, Mr. Charkham helpfully invited my attention to a number of the authorities and to such discussion as there is on s.20(2)(m) and its predecessors. Taking the matter very shortly, for present purposes, the following propositions emerge:

1. The words "in respect of" are wide words which should not be unduly restricted: The Kommunar, [1997] 1 Lloyd's Rep. 1, at p.5.
2. Section 20(2)(m), which is derived from the equivalent provision in the Administration of Justice Act, 1956, contains a jurisdiction which is no narrower than the predecessor jurisdiction in respect of claims for "necessaries": The Fairport (No. 5), [1967] 2 Lloyd's Rep. 162; The Kommunar, sup.
3. No distinction is to be drawn: ...between necessaries for the ship and necessaries for the voyage, and all things reasonably requisite for the particular adventure on which the ship is bound are comprised in this category. [Roscoe, The Admiralty Jurisdiction and Practice, 5th ed., at p. 203: The Riga (1872) L.R. 3 Ad. & Ecc. 516].
4. The jurisdiction extends to the provision of services: The Equator, (1921) 9 L1.L.Re. 1: The Fairport (No. 5), sup.

In the light of these propositions, I am satisfied that the plaintiffs bring their claims within s. 20(2)(m). Provisions for the passengers were "necessaries" for the particular adventure on which this passenger vessel was engaged. The provision of services is capable of coming within the sub-section and does so here, given the nature of the services provided. I should mention that I was referred in addition to The River Rima, [1988] 2 Lloyd's Rep. 193 (H.L.) and [1987] 2 Lloyd's Rep. 106 (C.A.) but, as I understand it, nothing said there precludes my decision in favour of the plaintiffs on the facts of this case."

In Nore Challenger and Nore Commander [(2001) Vol. 2 Lloyd's Law Reports 103] the claim relating to supply of crew was held to be "necessary" stating:

"Before considering whether the concept of necessaries encompasses the provision or supply of crew, it is important to bear in mind that it has long been established that no distinction need be drawn between the supply of necessaries and the payment for such supply."

Identical view has been taken by a Court of Durban in M.V. Emerald Transporter [1985 2 SALR 448] with reference to the provisions contained in Admiralty Jurisdiction Regulation Act 105 of 1983 wherein it was held that services which are insured solely to the benefit of the ship owner would not be classed as necessaries. The said decision was, however, rendered in the context of ranking of claims against a fund comprising of sale proceeds of the vessel M.V. Emerald Transporter.

The House of Lords in The River Rima (supra) considered the provisions of Article 1(1)(k) of the 1952 Brussels Arrest Convention incorporating "goods or materials wherever supplied to a ship for her operation or maintenance" as a maritime claim. Having regard to the provisions contained in Section 6 of Admiralty Court Act, 1840 and Section 5 of Admiralty Court Act, 1861 it was held:

"In other words, what is now called a claim in respect of goods or materials supplied to a ship for her operation or maintenance is the equivalent of what used to be called a claim for necessaries, but without the restrictions which formerly applied to such a claim."

(Emphasis Supplied)

The Singapore High Court also in Golden Petroleum (1994 1 SLR 92) considered the expression "goods supplied to a ship for her operation and maintenance" in the following terms:

"In my opinion, bunker oil supplied to the ship for sale to other ships could not be conceived as goods supplied for her operation. The phrase 'operation of the ship' should not be equated with the business activities of the shipowner and the section as enacted could not cover goods which are loaded onto two ship only to be unloaded or disposed of soon thereafter by sale."

It appears that the matter is pending in appeal.

Yet again in Gatoil International (supra), it was held:

"An agreement for the cancellation of a contract for the carriage of goods in a ship or for the use or hire of a ship would, I think, show a sufficiently direct connection. It is unnecessary to speculate what other cases might be covered. Each case would require to be decided on its own facts. As regards the contract of insurance founded on in the instant appeal, I am of opinion that it is not connected with the carriage of goods in a ship in a sufficiently direct sense to be capable of coming within para (e)."

The question, however, is as to whether having regard to the changed situation unpaid insurance premium should be held to be a commercial necessity. With a view to answer the question it is necessary to consider as to whether a failure to insure the security is a matter which would have a bearing upon the security of the ship.

Whether the provisions of insurance is to be considered to be a service? A further question which may arise is as to whether such service is to the ship or not ?

INSURANCE COVERS - EXTENT OF:

The law of marine insurance rested almost entirely on common law. Only a few isolated points were dealt with by statute. Although, there may be a plethora of authority on some points, the decisions may be meagre on others. The interpretative changes made from time to time turned upon new commercial conditions, the old ones having become obsolete. Some countries enacted and codified marine laws while many did not. With the passage of time, the scope and ambit of the contracts

of insurance increased not only having regard to the experience gathered by the contracting parties but also by the legislators and the Court. A lot of amendments in the statutes as also interpretive changes took place. The decisions rendered by different courts on marine insurance law even frequently apply to non-marine insurance. With the increase in marine traffic, the insurance law also developed and new varieties of insurance covers came into being. There has been a considerable expansion of the practice of insurance against various forums of legal liabilities which the assured may incur to the third parties.

P&I mutual insurances cover the liabilities of assured shipowner incurred to third parties. In Modern Admiralty Law by Aleka Mandaraka-Sheppard at page 642, it is stated:

"P&I mutual insurance (P&I associations) cover the liabilities of their assured shipowner incurred to third parties, which include cargo claims, pollution liabilities, damage to harbours, piers, etc., and personal injury or loss of life claims, which are all excluded from the RDC clause. In addition the P&I association insures the remaining one-fourth of the assured' liability under the RDC clause. Legal costs in defending such claims are covered as well."

The title of a claimant to sue the defendant as regard cargo claim enquiry has been stated in Shipping Law by Simon Baughen, Second Edition at page 16-17 in the following terms:

"Does the claimant have title to sue the defendant?

'Title to sue' means the claimant's right to sue the defendant, be it in contract, tort or bailment, in respect of the transit losses it will have borne as a buyer taking delivery at the end of a chain of sale contracts. If the claimant has insured the goods and has been indemnified, then the action may be brought in its name by its insurers under the process of subrogation.

The defendant will usually be the shipowner, but may also be a charterer or a freight forwarder who has contracted as carrier. If an inaccurate bill of lading is signed, the defendant could also be the party who actually signed the bill of lading. The shipowner's liability in respect of cargo claims will generally be covered by liability insurance, known as 'P&I' (protection and indemnity) insurance. Shipowners will not be covered in respect of claims arising out of deviation, misdelivery and the issuing of a 'clean' bill of lading for goods that were damaged prior to loading."

Apart from P&I club, there exists the Inter club Agreement (ICA).

In Shipping Law by Simon Baughen, at page 183, it is stated :

"Another very common clause in time charters is the 'Inter-Club Agreement' (ICA). The agreement began as an agreement between the P&I Clubs as to how they would recommend settlement of cargo claims as between shipowners and charterers where the NYPE form time charter is used. It is now common for the agreement to be specifically incorporated into the time charter. Indeed the NYPE 1993 form contains a printed cl 27 to this effect."

The Special Compensation P&I Club Clause (the SCOPIC clause) enumerated from Article 14 remuneration after The Nagasaki Spirit, in 1999 as a result of discontent by salvors. Although this provision affected only the salvor and the shipowner, the international groups of P&I Clubs have agreed a code of conduct giving their backing to the clause whenever a ship enters with the International Group is salved by a member of the International Salve Union. The salient features of the claim which received clarificatory amendment in 2000 are as under:

"For the clause to operate it needs to be specifically incorporated into an LOF contract, of whatever form. LOF 2000 contains a box to be ticked if the parties agree to the incorporation of the SCOPIC clause. If the clause is incorporated it then needs to be invoked by salvor. This can be done even if there is no threat to the environment. Invoking the clause completely replaces the right of the salvor to claim under Art. 14, even in respect of services performed before the invocation of the clause. The provisions of Art. 14(5) and (6), however, continue to remain effective. Within two days of the clause being invoked, cl 3 obliges the shipowner to put up security for the salvor's claim under the clause in the amount of US$3,000,000. If the shipowner fails to do so, cl 4 entitles the salvor to withdraw from the SCOPIC clause, provided the security is still outstanding at the date of withdrawal.

Clause 5 provides that SCOPIC remuneration is to be calculated by reference to an agreed tariff of rates that are profitable to salvors, calculated by reference to the horsepower of the salvage tug/s employed. It also covers the salvor's out of pocket expenses. An uplift of 25% is applied to both these heads of claim. Clause 6 provides that SCOPIC remuneration is payable only in the event that it exceeds the amount of the award under Art 13. To deter salvors from invoking SCOPIC too readily, cl 7 provides that in the event of SCOPIC remuneration falling below the amount of the Art 13 award, that award shall be discounted by 25% of the difference between the award and the SCOPIC remuneration. Thus, where the Art 13 award is for $1,000,000 and the SCOPIC remuneration is only $600,000, the Art 13 award will be reduced by $100,000 being 25% of the difference between the two sums, giving the salvor a net award of $900,000.

The SCOPIC clause also provides for the termination of both the SCOPIC provisions and the LOF in two situations. First, the salvor can terminate if the cost of its services less any SCOPIC remunerations exceeds the value of the salved property. Secondly, the shipowner can terminate by giving five days' notice. These termination provisions do not apply if the contractor is restrained from demobilizing its equipment by a public body with jurisdiction over the area where the services are being performed. Once the clause has been invoked, the shipowner is entitled to appoint a Special Casualty Representative (SCR) to monitor the salvage services. The SCR does not impinge on the authority of the salvage master but does have the right to be kept fully informed about the progress of the salvage operations. This provision improves the flow of information back to the P&I Club whose interests will ultimately be affected by the salvage services."

[See Shipping Law by Simon Baughen - page 293]

NECESSITY OF INSURANCE COVER:

The necessity of a P&I cover is in commercial expediency. All P&I clubs are non-profit making companies. The owner upon entering the ship becomes the member of the P&I club and he not only pays membership fee but undertakes to pay contribution towards the losses incurred by other members of the club which are payable by the company. A new concept has come into being in terms whereof a reciprocal system has been evolved to the effect that each member is cast under a duty to refund the damage suffered by any one of them and pay, on mutual basis, each other's claim. Thus, the members play a dual role of both beneficiary and benefactor. We have noticed the concept of such clubs. The Indian statutes operating in the field are pointer to the fact that such insurance has become more and more commercially expedient. No ship having regard to the ramification in international law can sail without such insurance. Apart from the 1952 Brussels Arrest Convention, the Merchant Shipping (Oil) Pollution Act, 1961 makes insurance compulsory.

As would be noticed hereinafter, P&I insurance cover to call at major ports in India is now a statutory requirement.

CHANGING SCENARIO :

The advancement in law would be evident from the 1999 Arrest Convention whereby significant changes to the law relating to in rem claims and arrest has been made. Pursuant to Article 14 of the 1999 Arrest Convention, such changes would come into force six months after ratification by the 10th State.

The countries which have ratified the Convention are as follows:

"Algeria, Antigua and Barbuda, Bahamas, Belgium, Belize, Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Costa Rica, Ctte d'Ivoire, Croatia, Cuba, Denmark, Djibouti, Dominica, Republic of, Egypt, Fiji, Finland,

France, Overseas Territories, Gabon, Germany, Greece, Grenada, Guyana, Guinea, Haiti, Haute-Volta, Holy, Seat, Ireland, Italy, Khmere Republic, Kiribati, Latvia, Luxembourg, Madagascar, Marocco, Mauritania, Mauritius, Netherlands, Niger, Nigeria, North Borneo, Norway, Paraguay, Poland, Portugal, Romania, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sarawak, Senegal, Seychelles, Slovenia, Solomon Islands, Spain, Sudan, Sweden, Switzerland, Syrian Arabic Republic, Tchad, Togo, Tonga, Turks Isles and Caicos, Tuvalu, United Kingdom of Great Britain, and Northern Ireland, United Kingdom (Overseas Territories), Gibraltar, Hong-Kong (1), British Virgin Islands, Bermuda, Anguilla, Caiman Islands, Montserrat, St. Helena, Guernsey, Falkland Islands and dependencies, Zaire."

Article 1 of the Convention contemplates an expansion of existing categories of arrestable claims under the following headings, some of which, namely, heading (c) and (d) are already reflected in Section 20(2) of the Supreme Court Act, 1981:

(a) this refers to 'loss or damage caused by the operation of the ship' rather than 'damage done by a ship' and would encompass claims for pure economic loss...
(c) this extends the category of salvage to include claims arising from salvage agreements or special compensation under Art. 14 of the 1989 Salvage Convention;
(d) this covers damage to environment, including threatened damage...
(l) this extends the scope of claims in respect of supply of goods and materials to a ship to cover 'provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance';
(m) this extends the scope of claims against ships by shipyards to cover 'construction, reconstruction, repair, converting or equipping of the ship'...
(o) this extends the scope of claims in respect of port dues, and also in respect of wages which will now cover repatriation costs and social insurance contributions...
(u) this extends the scope of claims in respect of mortgages by removing the reference to a registered or registrable mortgage, thereby encompassing unregistered mortgages...

The purpose of the 1952 Convention was to restrict the possibilities of arrest with regard to seagoing vessels flying the flag of a contracting State. Such an arrest was allowed for maritime claims against the vessel or against the sister ship belonging to the same owners. What would be the maritime claim is specified in Article 1 of the Convention. Other claims can only be secured if the vessel's home port is situated in a non-contracting State.

Apart from those restrictions resulting from the Convention, all kinds of claims can be secured by an arrest and there is no need to prove a connection with the operation of the vessel. As for example, a guarantee given by the owners for a subsidiary company or other principal debtor is as suitable as a claim resulting from the purchase of the ship or any other goods by the owners. However, in terms of Article 1(k) of the Convention claims for "goods or materials" supplied

to a ship for her operation or maintenance are acknowledged as maritime claims.

What was expressly excluded in 1952 convention has been included in 1999 convention. The restrictions imposed under 1952 convention as regard 'Maritime claim' to operation of ship and maintenance thereof have been removed.

In Kapila Hingorani Vs. State of Bihar [JT 2003 (5) SC 1] this Court observed:

"Justice Holmes expressed the following view in Missouri vs. Holland [252 US 416 (433)] :

"When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realise that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realise or to hope that they had created an organism, it has taken a century and has cost their successors must sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

Justice Frankfurter elucidated the interpretive role in "Some Reflections on the Reading of Statutes" :

"There are varying shades of compulsion for judges behind different words, differences that are due to the words themselves, their setting in a text, their setting in history. In short, judges are not unfettered glossators. They are under a special duty not to overemphasize the episodic aspects of life and not to undervalue its organic processes - its continuities and relationships"

In Jagdish Saran and Others Vs. Union of India [(1980) 2 SCC 768], it is stated:

"Law, constitutional law, is not an omnipotent abstraction or distant idealization but a principled, yet pragmatic, value-laden and result-oriented, set of propositions applicable to and conditioned by a concrete stage of social development of the nation and aspirational imperatives of the people. India Today - that is the inarticulate major premise of our constitutional law and life."

It is also well-settled that interpretation of the Constitution of India or statutes would change from time to time. Being a living organ, it is ongoing and with the passage of time, law must change. New rights may have to be found out within the constitutional scheme. Horizons of constitutional law are expanding."

In the aforementioned judgment, this Court referred to a large number of decisions for the purpose of interpreting the constitutional provisions in the light of the international treaties and conventions.

Further more in John Vallamattom and Anr. Vs. Union of India [JT 2003 (6) SC 37] while referring to an amendment made in U.K. in relation to a provision which was in pari materia with Section 118 of the Indian Succession Act, 1925, this Court observed:

"...The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretive changes of the statute effected by passage of time."

Referring to the changing scenario of the law having regard to the declaration on the right to development adopted by the World Conference on Human Rights and Article 18 of the United Nations Covenant on Civil and Political Rights, 1966, it was held:

"It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26.11.1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changing situation.

Justice Cardoze said :

"The law has its epochs of ebb and flow, the flood tides are on us. The old order may change yielding place to new; but the transition is never an easy process".

Albert Campus stated :

"The wheel turns, history changes". Stability and change are the two sides of the same law-coin. In their pure form they are antagonistic poles; without stability the law becomes not a chart of conduct, but a gare of chance: with only stability the law is as the still waters in which there is only stagnation and death."

In any view of the matter even if a provision was not unconstitutional on the day on which it was enacted or the Constitution came into force, by reason of facts emerging out thereafter, the same may be rendered unconstitutional."

Yet again in Indian Handicrafts Emporium & Ors. Vs. Union of India [2003 (6) SCALE 831] this Court considered the Convention on International Trade in Endangered Species (CITES) and applied the principles of purposive constructions as also not only the Directive Principles as contained in Part IV of the Constitution but also

Fundamental Duties as contained in Part IVA thereof.

Referring to Motor General Traders and Another vs. State of Andhra Pradesh and Others [(1984) 1 SCC 222], Rattan Arya and Others vs. State of Tamil Nadu and Another [(1986) 3 SCC 385] and Synthetics and Chemicals Ltd. and Others vs. State of U.P. and Others [(1990) 1 SCC 109], this Court held:

"There cannot be any doubt whatsoever that a law which was at one point of time was constitutional may be rendered unconstitutional because of passage of time. We may note that apart from the decisions cited by Mr. Sanghi, recently a similar view has been taken in Kapila Hingorani Vs. State of Bihar [JT 2003 (5) SC 1] and John Vallamattom and Anr. Vs. Union of India [JT 2003 (6) SC 37]."

It was, however, held that India being a sovereign country is not obligated to make law only in terms of CITES. It may impose stricter restrictions having regard to the local needs.

Legal history is a good guide for the purpose of appreciating the legal development across the world particularly in the field of international law, maritime law being a part of it. While interpreting such a situation, one must take into consideration the flexibility in law as has been highlighted by this Court in m.v. Al Quamar (supra) wherein it was opined:

"43. The two decisions noted above in our view deal with the situation amply after having considered more or less the entire gamut of judicial precedents. Barker, J's judgment in the New Zealand case ((1980) 1 NZLR 104 (NZSC)) very lucidly sets out that the court has to approach the modem problem with some amount of flexibility as is now being faced in the modern business trend. Flexibility is the virtue of the law courts as Roscoe Pound puts it. The pedantic approach of the law courts are no longer existing by reason of the global change of outlook in trade and commerce. The observations of Barker, J. and the findings thereon in the New Zealand case ((1980) 1 NZLR 104 (NZSC)) with the longish narrations as above, depicts our inclination to concur with the same, but since issue is slightly different in the matter under consideration, we, however, leave the issue open, though the two decisions as above cannot be doubted in any way whatsoever and we feel it expedient to record that there exists sufficient reasons and justification in the submission of Mr. Desai as regards the invocation of jurisdiction under Section 44-A of the Code upon reliance on the two decisions of the New Zealand and Australian Courts."

No statutory law in India operates in the field. Interpretative changes, if any, must, thus be made having regard to the ever changing global scenario.

This Court in M.V. Elisabeth (supra) observed that Indian statutes lag behind any development of international law and further it had not adopted the various conventions but opined that the provisions thereof

having been made as a result of international unification and development of the maritime laws of the world should be regarded as the international common law or transnational law rooted in and evolved out of the general principles of national laws, which, in the absence of any specific statutory provisions can be adopted and adapted by courts to supplement and complement national statutes on this subject.

This Court in M.V. Elisabeth (supra) observed:

"30. The Exchequer Court of Canada was established by the Admiralty Act R. S. Canada, 1906, c. 141, as a Colonial Court of Admiralty. It is not clear whether that Court was in its jurisdiction comparable to the Indian High Courts. Assuming that it was comparable at the relevant time, and whatever be the relevance of Yuri Maru (1927 AC 906 : 43 TLR 698) to courts like the Exchequer Court of Canada, we see no reason why the jurisdiction of Indian High Courts, governed as they now are by the Constitution of India, should in any way be subjected to the jurisdictional fetters imposed by the Privy Council in that decision. Legal history is good guidance for the future, but to surrender to the former is to lose the latter."

(Emphasis supplied)

(See paras 78 and 99 also)

It was further observed:

"89. All persons and things within the waters of a State fall within its jurisdiction unless specifically curtailed or regulated by rules of international law. The power to arrest a foreign vessel, while in the waters of a coastal State, in respect of a maritime claims, wherever arising, is a demonstrable manifestation and an essential attribute of territorial sovereignty. This power is recognised by several international conventions (See the Conventions referred to above. See also Nagendra Singh, International Maritime Conventions, British Shipping Laws, Vol. 4). These conventions contain the unified rules of law drawn from different legal systems. Although many of these conventions have yet to be ratified by India, they embody principles of law recognised by the generality of maritime States, and can therefore be regarded as part of our common law. The want of ratification of these conventions is apparently not because of any policy disagreement, as is clear from active and fruitful Indian participation in the formulation of rules adopted by the conventions, but perhaps because of other circumstances, such as lack of an adequate and specialised machinery for implementation of the various international conventions by co-ordinating for the purpose the Departments concerned of the Government. Such a specialised body of legal and technical experts can facilitate adoption of internationally unified rules by national legislation. It is appropriate that sufficient attention is paid to this aspect of the matter by the authorities concerned. Perhaps the Law Commission of India, endowed as it ought to be with sufficient authority, status and independence, as is the position in England, can render valuable help in

this regard. Delay in the adoption of international conventions which are intended to facilitate trade hinders the economic growth of the nation."

(Emphasis supplied)

M.V. Elisabeth (supra) is an authority for the proposition that the changing global scenario should be kept in mind having regard to the fact that there does not exist any primary act touching the subject and in absence of any domestic legislation to the contrary; if the 1952 Arrest Convention had been applied, although India was not a signatory thereto, there is obviously no reason as to why the 1999 Arrest Convention should not be applied.

Application of the 1999 convention in the process of interpretive changes, however, would be subject to : (1) domestic law which may be enacted by the Parliament; and (2) it should be applied only for enforcement of a contract involving public law character.

It is not correct to contend as has been submitted by Mr. Bharucha that this Court having regard to the decision in M.V. Elisabeth (supra) must follow the law which is currently prevalent in UK and confine itself only to the 1952 Arrest Convention into Indian Admiralty Jurisprudence. The question is as to if the 1952 Arrest Convention had been applied keeping in view the changing scenario why not the 1999 Arrest Convention also? A distinction must be borne in mind between a jurisdiction exercised by the High Courts in India in terms of the existing laws and the manner in which such jurisdiction can be exercised. Once the Court opines that insurance is needed to keep the ship going - it has to be construed as 'Necessaries'. The jurisdiction of the Courts in India, in view of the decision of this Court in M.V. Elisabeth (supra)is akin to the jurisdiction of the English Courts but the same would not mean that the Indian High Courts are not free to take a different view from those of the English Courts. As regard application of a statute law the Indian High Courts would follow the pre-independence statute but Indian Courts need not follow the judge-made law.

M.V. Eligabeth defines the jurisdiction of the Court but does not limit or restrict it.

Supply of necessaries is a maritime lien in U.S.A. in terms of the relevant statute and has been classified in the category of subordinate to the Preferred Ship Mortgage.

In Benedict on Admiralty, 6th Edn., Vol.1, p. 22, it has been stated :

"Whenever a debt of a maritime nature is by law, no matter what law, or by contract, a lien upon the vessel, the vessel may be proceeded against in rem. The maritime lien, whether created by actual hypothecation or by implication or operation of law, may be enforced in the admiralty."

It is true that this Court is not bound by the American decisions. The American decisions have merely a persuasive value but this Court would not hesitate in borrowing the principles if the same is in consonance with the scheme of Indian law keeping in view the changing global scenario. Global changes and outlook in trade and commerce could be a relevant factor. With the change of time; from narrow and pedantic approach, the Court may resort to broad and liberal interpretation. What was not considered to be a necessity a century back, may be held to be so now.

INDIAN STATUTES OPERATING IN THE FIELD:

Section 352 N of the Indian Merchant Shipping Act, 1958 makes such an insurance compulsory which reads as under:

"352-N. Compulsory insurance or other financial guarantee. - (1) The owner of every Indian ship which carries 2000 tons or more oil in bulk as cargo, shall, in respect of such ship, maintain an insurance or other financial security for an amount equivalent to -

(a) one hundred and thirty-three Special Drawing Rights for each ton of the ship's tonnage; or
(b) fourteen million Special Drawing Rights, whichever is lower.

The Inland Vessels Act requires a compulsory third party risk insurance cover and the standard format charter parties mostly have printed clauses making it mandatory for a vessel to have a valid protection and indemnity cover for want of which such vessels are not accepted for charter.

Chapter IV of the Inland Vessels Act provides for a compulsory insurance in terms whereof Chapter VIII of the Motor Vehicles Act, 1939 has been incorporated by reference.

This Court while considering the question of third party insurance in Motor Vehicles has noticed the development of law from the Road Traffic Act, 1930 and Motor Vehicles Act, 1939 to Motor Vehicles Act, 1988 and the amendments carried out therein from time to time. [See National Insurance Co. Ltd., Chandigarh vs. Nicolletta Rohtagi and Others - (2002) 7 SCC 456].

The Multimodal Transportation of Goods (Amendment) Act 2000 inter alia provides for responsibilities and liabilities of the multimodal transport operator. By reason of Act 44 of 2000 a proviso has been added. Section 5 of the said Act amends Section 7 of the Principal Act of 1993 and reads as under:

"5. In Section 7 of the principal Act, in sub-section (1), the following proviso shall be inserted, namely:-

"Provided that the multimodal transport operator shall issue the multimodal transport document only after obtaining and during the subsistence of a valid insurance cover."

CIRCULARS:

The insurance association has issued a circular dated 20th February, 2001 which is to the following effect:

"TO THE MEMBERS

Dear Sirs

NEW COMPULSORY INSURANCE REQUIREMENTS IN AUSTRALIAN WATERS

Members should be aware that new Compulsory

Insurance requirements for non tank vessels have come into force in Australia. Details are available at the website of the AMSA - http:/www.amsa.gov.au.

From 6th April 2001 ships of 400gt or more (excluding tankers covered by CLC Certificates) will be required to carry a "relevant insurance certificate" containing the following information:

a) the name of the ship
b) the name of the ship's owner
c) the name and address of the insurer
d) the commencement date of the insurance
e) the amount of cover which must in any event not be less than the limit of liability under the 1976 Limitation Convention.

The "relevant insurance certificate" will need to be produced during Port State Control inspections and by the Australian Customs Service on entering or leaving Australian ports.

A six months period of grace will be allowed before full enforcement action is undertaken; ships without sufficient documentation on board will be given a warning until 5th September, 2001. Thereafter ships will be detained until the requirement documentation is produced.

AMSA officials have indicated that although the Notice requires that the amount of cover be set out in the Certificate of Entry it will be assumed if a dollar amount is not set out that Club cover in any event extends at least to the cover provided under the 1976 Convention as amended.

AMSA officials have also indicated that if a vessel does not carry any original certificate of Entry they will be satisfied with the provision of a photocopy on the vessel's first visit. However on the second and subsequent visits vessels will be expected to carry an original Certificate of Entry.

Please contact the Club if you need further information.

Yours faithfully,

THOMAS MILLER (BERMUDA) LTD."

A circular has also been issued by the Insurance Association on 26.07.2000 regarding new legislation in U.S.A. (Alaska) which is to the following effect:

"26 July 2000

TO ALL MEMBERS

Dear Sirs

OIL POLLUTION: UNITED STATES
NEW LEGISLATION IN ALASKA FOR NON-TANK VESSELS
FINANCIAL RESPONSIBILITY REQUIREMENTS: DRAFT
REGULATIONS

In May 2000 the State of Alaska followed the recent example of California in passing legislation requiring non-tank self-propelled vessels operating in Alaskan waters and exceeding 400 gt to demonstrate proof of financial responsibility for oil spills occurring in Alaskan waters. The effective date of the Financial Responsibility Act is 1 September 2000.

Proof of financial responsibility must be established for non-tank vessels operating in Alaskan waters in the following amounts:

(a) For vessels carrying predominately persistent product, $300 per incident for each barrel of oil storage capacity, or $5,000,000, whichever is greater.
(b) For vessels carrying predominately non-persistent product, $100 per incident for each barrel of oil storage capacity, or $1,000,000, whichever is greater.

The Act applies to non-tank vessels over 400 gt which by definition covers self-propelled vessels including commercial fishing vessels, passenger and cargo vessels. Barges are excluded, as are public vessels unless "engaged in commerce".

The Alaska Department of Environmental Conservation (ADEC) have proposed draft regulations to implement the financial responsibility requirements. ADEC predicts that their regulations will not become final until September or early October 2000 but the effective date for the new law remains 1 September 2000. A summary of the draft regulations is set out below:

Interim applications and Documentation for Proof of Financial Responsibility

An interim application procedure is set out in ADEC’s letter of 17 July 2000, which is attached. Owners or operators of non-tank vessels covered by the new law must submit a completed application and documentation of financial responsibility in the appropriate dollar amount not later than 31 August 2000.

Acceptable financial responsibility may include the following:

a. Affidavit of self-insurance and most recent audited financial statement;

b. Insurance certificate and insurance policy;
c. Surety bond;
d. Financial guarantee, accompanied by guarantor's evidence of self insurance;
e. Letter of credit;
f. Certificate of entry evidencing coverage by a Protection and Indemnity Club; or
g. Certificate of deposit with assignment of negotiable interest.

Interim Approval

A completed application form and appropriate documentation evidencing proof of financial responsibility which is submitted by 31 August 2000 will be deemed approved by ADEC for purposes of meeting the 1 September 2000 deadline. Following adoption of final regulations, ADEC will review each application to ensure that it meets the requirements of the statute and regulations. A formal approval will be given to those vessels which qualify, and non-qualifying applicants will be given 30 days to submit additional information as requested by the Department.

Application Form

A copy of ADEC's application form is attached. In Section (c), paragraph 1(b), proof of financial responsibility by entry in a P&I Club must include a Certificate of Entry and must include "all addenda pertaining to the amount and applicability of oil pollution cover and amount of deductibles."

Deductibles

With respect of deductibles, paragraph 1(c) of the application asks for proof of financial responsibility for any deductible, such as a certificate of deposit, or other "financial information." It thus appears that ADEC will require some evidence of financial responsibility for any deductible as is presently required by ADEC's draft regulations.

ADEC is presently considering whether to allow an interim application which does not have separate proof of financial responsibility for a deductible. However, at this juncture Owners and operators with insurance deductibles should probably plan to submit separate proof of financial responsibility for any deductible. There are likely to be further developments on this issue and Members will be kept advised.

The Managers intend to issue a further circular when these regulations become final.

In the meantime, Members may contact Mr. Douglas R Davis of the Association's correspondents at Anchorage, Alaska:

Kessal Young & Logan, Tel: +1(0)907 279 9696, Fax: +1(0)907 279 4239 for further assistance. Mr. Davis has filed submissions to ADEC on behalf of the International Group in relation to the draft regulations, and can assist Members with applications.

Yours faithfully
A BILBOUGH & CO. LTD
(MANAGERS)"

The major ports in India, namely, Mumbai and Kolkata had issued circulars which are as under:

"MUMBAI PORT TRUST
Deputy Conservator's Office
Port House, 1st Floor
Shoorji Vallabhadas Marg
Mumbai - 400 001

No. DC/C.SH/2/4455 8th August, 1996

CIRCULAR

To

Ship Owners/Stevedores/Vessel Agents

The Secretary
Bombay & Nhave/Sheve Ship-Intermodel
Agents Association
3, Rex Chambers, Ground Floor
Valchand Hirachand Marg
Ballard Estate, Mumbai - 400 001

The Secretary
The Bombay Stevedores Association Ltd.,
Janmabhoomi Chambers, 2nd Floor,
Valchand Hirachand Marg,
Ballard Estate, Mumbai - 400 001

Subsequent to the Circular Nos. DC/C-SH/7200 dated 4th October, 1995 and DC/C-SH/2/3661 dated 9th July, 1996 and in view of recent experience gathered from the storm which hit the harbour on 18th and 19th June, 1996. It has been decided that vessels which do not possess valid P&I club cover or suitable Insurance Cover will not be decked. The intention of the Port is to eliminate all sub-standard vessels or ships without insurance cover, making Mumbai a port of call, because a mishap to such a vessel will render the port liable for expenses of wreck removal or other damages caused.

2. Therefore, notice is hereby given that from 1st November, 1996, ships, which do not possess valued insurance cover will not be given an anchorage berth in the Mumbai Port for cargo work or for any other purpose, this notice period is given so that the owners, agents and shippers proposing to load cargo have sufficient

time to ensure that such cargoes will be loaded on duly protected ships.

Sd/-
Deputy Conservators

CALCUTTA PORT TRUST
HARBOUR MASTER (PORT)'S OFFICE
CIRCULAR NO. 10 DATED 26.6.2001

To

All Shipping Agents

To safeguard Port interest for damage cost of repairs due marine accident or otherwise, it is mandatory for the Agents to declare along with Berthing Application the details of P&I Club Coverage including period of validity and a declaration that insurance provides comprehensive coverage, inter alia, the following risks:

1) 3rd party liability claims
2) Claims arising out of injury/ death etc.
3) Claims arising out of damage to port properties
4) Claims against environmental damage owing to pollution caused by the ship or its personnel
5) Removal of the wreck comprehensively

The above details required to be submitted along with Berthing application to Harbour Master (River) & Harbour Master (*Port).

Sd/-
(D.K. Rao)
Harbour Master (Port)
Copy to:
DMD/TMN/FA&CAO/Secretary/H.M.(R)"

Cochin Port Trust had also been contemplating to issue such circular.

It may be true that some ports have not issued such circulars but from a bare perusal of the circulars as referred to hereinbefore, it would appear that such insurance cover has been considered to be a service having regard to the cover extended to oil spill, damage to port, salvage operation, etc.

The circulars issued by the Port Trusts may not be determinative but there cannot be any doubt whatsoever the same would also be a relevant factor.

The 'Vessel' is also not correct in its submission that the ports cannot take any direct action against the insurers. The circulars issued are pointers to the fact that development of law in other countries is being taken note of for the purpose of taking insurance cover in different fields as a compulsive measure.

A DRIFT IN THE CONCEPT?

Whether arrears of insurance premium would come within the term "necessaries" is the core question involved in these appeals. The term has not been statutorily defined.

The term 'necessaries' as defined in Black's Law Dictionary reads as under:

"What constitutes "necessaries" for which an admiralty lien will attach depends upon what is reasonably needed in the ship's business, regard being had to the character of the voyage and the employment in which the vessel is being used."

In Bouvier's Law Dictionary, the term 'necessaries' has inter alia been defined as follows:

"The term necessaries is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society.

A racing bicycle was held a necessary for an apprentice earning 21s. a week and living with his parents; 78 L.T. 296"

In The Canadian Law Dictionary, the term 'necessaries' has been defined as follows:

"In the case of ships, the term denotes whatever is fit and proper for the service on which the ship is engaged, whatever the owner of that vessel, as a prudent man would have ordered if present at the time. Victoria Machinery Depot Co. Ltd. v. The 'Canada' and the 'Triumph', (1913) 15 Ex.C.R. 136, 14 D.L.R. 318."

In Ballentine's Law Dictionary, the term 'necessaries' has been defined as follows:

"Under the maritime law permitting the master of a ship to pledge the owner's credit for necessaries, the word does not import absolute necessity, but the circumstances must be such that a reasonable prudent owner, present, would have authorized the expenditures, and it is usually sufficient if they are reasonably fit and proper, having regard to the exigencies and requirements of the ship, for the port where she is lying and the voyage on which she is bound. 48 Am J1st Ship ' 133."

In 70 American Jurisprudence 2d, at page 478, it is stated:

"The term "necessary" in this connection does not mean indispensable to the safety of the vessel and crew; necessaries which will create a lien upon the ship are such as are reasonably fit and proper for her under the circumstances, and not merely such as are absolutely indispensable for her safety or the accomplishment of the voyage. Whatever a

prudent owner, if present, would be supposed to have authorized, the master may order, and for such expenditures the vessel will be held responsible."

We may further notice that in Modern Admiralty Law by Aleka Mandaraka-Sheppard at page 52, it is stated:

"However, the decision of the Scottish Court of Session in The Aifanourios, mentioned above, shattered the hopes of P&I clubs. It took 19 years for the wheel to turn round and so to include such claims in the list of claims provided by the new Arrest Convention 1999. The new Arrest Convention 1999 has incorporated in the list of maritime claims for insurance premiums and brokerage, including claims by a P&I club for unpaid calls. Such claims will qualify for an arrest of a ship to be made once the Convention comes into force, or is enacted by the UK."

In Principles of Maritime Law by Susan Hodges and Christopher Hill at page 364 it is stated:

"Failure to insure the ship: The authorities of Laming v. Seater, The Heather Bell, and Law Guarantee and Trust Society v. Russian Bank for Foreign Trade and others have all confirmed that a failure to insure the security is a matter which would have a bearing upon the security of the ship. In such an event, the mortgagee may enter into possession in order to make the ship available as security for the debt. It is to be noted that, in the last two cases, the court had also pointed out that a failure to insure the vessel (though it may constitute the basis of a right for the mortgagee to take possession) is not itself a legitimate ground for interfering with the performance of the charterparty."

It is interesting to note that in P&I clubs - Law and Practice by Steven J. Hazelwood, it is stated:

"The defendant shipowners challenged the competence of the court to deal with the action as an action in rem. The catalogue of claims which entitle a claimant to proceed with an action in rem in the courts of Scotland are stated in section 47(2) of the Administration of Justice Act 1956 which provides, inter alia: "This section applies to any claim arising out of one or more of the following, that is to say ...(d) any agreement relating to the use or hire of any ship whether by charter or otherwise;"."

The learned author, however, noticed the shortcomings in the statutes operating in United Kingdom and made a prophecy to the effect that contract of maritime insurance may be included in the list of claim giving the right of arrest in the following terms:

"The current position is, therefore, that claims

arising out of contracts of marine insurance are not claims which entitle a claimant to proceed by way of action in rem and claimants in respect of P.&I. Club membership are in no better position than those claiming in respect of traditional hull and cargo insurance.

In this context there is one respect in which the insurance cover offered by P.&I. Clubs differs from hull and cargo insurance and which has yet to receive the attention of the courts. Certain heads of P.&I. Cover have ceased to be matters which are, as Sir James Hannen P. once described, merely prudence but have become compulsory by law. Compulsory liability insurance was introduced in the area of oil pollution liability by the International Convention on Civil Liability for Oil Pollution 1969. Under the regime thereby introduced a shipowner is legally unable to trade or put to sea without having effected oil pollution indemnity insurance and having adequate liability insurance is as 'necessary' to a shipowner as having fuel, stores, navigational equipment or other well-recognised "necessaries". It is also arguable that as oil cannot be lawfully transported without the carrier having the required insurance cover, a contract for the entry of the vessel in a P&I Club could fairly be regarded as an agreement closely "relating to the carriage of goods in a ship or to the use of a ship".

It may be that in any future review of the 1952 Arrest Convention, claims relating to contracts of marine insurance will be included in the list of claims giving the right of arrest and provided the wording is framed appropriately to include club entry it may be that members who do not pay calls may one day find their vessels liable to arrest in this country."

The said prophecy has come true. The learned author has also noted the decision in Marazura Navegacion S.A. and Others v. Oceanus Mutual Underwriting Association (Bermuda) Ltd. and John Laing (Management) Ltd. [1977] 1 Lloyd's Rep. 283 wherein it has been noticed:

"Clubs can and do arrest vessels for non-payment of calls in jurisdictions which allow such actions; for example, the United States;"

In an interesting article "the International Convention on Arrest of Ships 1999" by Richard Shaw, it was opined:

"The 1999 Arrest Convention has produced a set of principles which are generally regarded as reasonably balanced, between the interests of legitimate claimants and those of shipping organizations seeking to ensure freedom of world trade without undue interference. The 1952 Arrest Convention has achieved a widespread degree of acceptance, and indeed there were

those who argued that it was preferable to retain its well-tried principles rather than risk upsetting them while correcting its few deficiencies.

The extension of the right of arrest to claims for environmental damage, wreck removal, insurance premiums, commissions, brokerage and agency fees, and ship sale contracts are all significant steps to correct those recognized deficiencies, while still retaining the exhaustive list of maritime claims which is the heritage of the common law Admiralty jurisdiction. The remainder of the 1999 Convention contains nothing revolutionary, the radical UK proposal on associated ship arrest having been rejected by the conference, but there are a number of provisions which provide useful clarification of the law. The active participation in the conference of delegations from China, Russia and the USA leads one to hope that these major states may, despite their relatively low rate of ratification of other maritime conventions, find this one sufficiently non-controversial to commend it to their legislatures."

The learned author further stated:

"The principles of international law relating to jurisdiction have evolved significantly since 1952, in Europe in particular under the European Convention on Jurisdiction and Judgments 1968, but also with the development in English Law of the doctrine of forum non conveniens in cases such as the "ABDIN DAVER" [1984] A.C. 398. The terms of Article 7 have therefore been drafted to reflect the modern law, while retaining the original principle in paragraph 1 that, in the absence of another rule of the lex fori arresti, the courts of the state where the ship has been arrested shall have jurisdiction to decide the merits of the claim."

In Project Gabcikovo-Nagymaros (Op. Ind. Weeramantry) the International Court in its judgment dated 25.9.1997 at page 114 albeit in a different context observed:

"As this Court observed in the Namibia case, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 31, para 53), and these principles are "not limited to the rules of international law applicable at the time the treaty was concluded."

In Equilease Corporation Vs. M.V. Sampson [793 F.2d 598] the Court was considering interpretation of Ship Mortgage Act, 46 providing for right to a federal maritime lien to "any person furnishing repairs,

supplies, or other necessaries, to any vessel. It was held:

"Equilease next argues that no maritime lien arises in favor of James because insurance is not a "necessary" and therefore neither general admiralty law nor the Act provides a maritime lien for unpaid insurance premiums. Equilease relies on Learned and on Grow v. Steel Gas Screw Lorrains K, 310 F.2d 547 (6th Cir. 1962), for this proposition. The Grow court stated in one sentence without elaboration that there is no federal maritime lien for insurance premiums, 310 F.2d at 549, and went on to grant the plaintiff insurance broker a lien under Michigan state law. Grow is thus not of much aid to us here. We focus instead on Learned."

"Equilease urges us to apply Learned and to find that marine insurance in 1986 insures solely to the benefit of a ship's owner, in no way aiding the ship, and therefore, that no federal lien can be had for unpaid insurance premiums. This we cannot do.

In the nineteenth century, an insurance policy on a ship was viewed as a contract for the personal indemnity of the insured ship's owner. Under this reasoning, no lien against the ship itself could possibly arise as the result of an insurance policy; "unless the ship is benefited the ship should not pay." In Re Petition of Insurance Co. of Pennsylvanis, 22 F.109, 116 (N.D.N.Y.1884), aff'd sub non. Insurance Co. of Pennsylvania v. The Proceeds of the Sale of the Barge Waubauschene, 24 F. 559 (C.C.N.D.N.Y.1885). It is no longer appropriate, however, to view maritime insurance this way. Even a vessel that simply sits at a dock without making any attempt to ply the waters must today have hull protection and indemnity insurance. As the district court noted, insurance is something that every vessel today needs just to carry on its normal business."

It was further held

"We therefore hold that because insurance is essential to keep a vessel in commerce, insurance is a "necessary" under 46 U.S.C. Sec. 971 and unpaid insurance premiums to give rise to a maritime lien under the FMLA."

Equilease Corp.(supra) has a greater persuasive value having regard to the fact that contemporary maritime statutes in England and other countries do not use the term "necessaries" but the American Federal Maritime Liens Act does.

The Indian courts need not follow the English judicial ideologies blindly. We must remind ourselves that in many fields, particularly, in the matter of preservation of 'Human Rights' and 'Ecology', Indian courts have gone far ahead than their English counterparts.

The decisions of the English Courts have been held to be a departure by the American Courts with regard to the jurisdiction of the admiralty but such departure is a well-known one.

Equilease Corporation has been noticed in Trident Marine Managers Inc. Vs. Serial No. CEBRF 0661586 [1988 American Maritime Cases 763].

The question, however, is whether a prudent shipowner would provide for an insurance. A compulsory insurance regime has come into being and keeping in view the changed situation the definition of the expression "necessaries" should also undergo a change.

The term "necessary" is a term of art but the same cannot, in our opinion, be used in a limited context of mandatory claims made for goods or services supplied to a particular ship for her physical necessity as opposed to commercial operation and maintenance. Physical necessity and practicality would be a relevant factor for determination of the said question. Taking insurance cover would not only be a commercial prudence but almost a must in the present day context. The third party insurance may not be compulsory in certain jurisdiction but having regard to the present day scenario such an insurance cover must be held to be intrinsically connected with the operation of a ship.

One of the relevant factors for arriving at a conclusion as to whether anything would come within the expression "necessary" or not will inter alia depend upon answer to the question as to whether the prudent owner would provide to enable a ship to perform well the functions for which she has been engaged. If getting the vehicle insured with P&I club would be one of the things which would enable a prudent owner to sail his ship for the purposes for which she has been engaged, the same would come within the purview of the said term. The matter must be considered having regard to the changing scenario inasmuch as the field of insurance has undergone a sea change from merely hull and machinery, the insurance companies cover various risks including oil spill damage to the Port, damage to the cargo etc. In that sense the term must be construed in a broad and liberal manner. The changing requirement of a ship so as to enable it to trade in commerce must be kept in mind which would lead to the conclusion that P & I Insurance cover would be necessary for operation of a ship.

It may be true that there are a large number of insurance covers; from hull and machinery insurance to protection and indemnity cover. But the question is not what insurance would be ’necessary’ and what would not be; as the issue has to be considered not only on a mere hypothesis but having regard to the statutes framed by other countries as also the 1999 Arrest Convention.

LEX FORI:

In Benedict on Admiralty, 6th Edn., Vol.1, p. 19, it has been stated :

"A ship is, of necessity, a wanderer. She visits shores where her owners are not known or are inaccessible. The master is the fully authorized agent of the distant owners but is not usually of sufficient pecuniary ability to respond to unforeseen demands of the voyage. These and other kindred characteristics of maritime commerce underlie the practice of finding in the ship itself security, in many cases, for demands against the master or owners in their conduct of the ship as an instrumentality, whether commercial or not, or in their contracts made on account of the ship."

In British Shipping Laws, Volume 14, while contrasting maritime liens and statutory rights of action it is stated:

"Although maritime liens and statutory rights of action in rem are similar in that they involve the Admiralty process in rem, there nonetheless exist fundamental differences between the two categories. These differences may be categories as follows:

(1) Nature of the claim
Although the point is not free of uncertainty it is probably the case that a maritime lien is a substantive right whereas a statutory right of action in rem is in essence a procedural remedy. The object behind the availability of a statutory right of action in rem is to enable a claimant to found a jurisdiction and to provide the res as security for the claim."

In Cheshire and North's Private International Law, 12th Edition, it is stated

"At first sight the principle seems almost self-evident. A person who resorts to an English court for the purpose of enforcing a foreign claim cannot expect to occupy a different procedural position from that of a domestic litigant. The field of procedure constitutes perhaps the most technical party of any legal system, and it comprises many rules that would be unintelligible to a foreign judge and certainly unworkable by a machinery designed on different lines. A party to litigation in England must take the law of procedure as he finds it. He cannot by virtue of some rule in his own country enjoy greater advantages than other parties here; neither must he be deprived of any advantages that English law may confer upon a litigant in the particular form of action. To take an old example, an English creditor who sued his debtor in Scotland could not insist on trial by jury, nor, in the converse case, could a Scottish creditor suing in England refuse the intervention of a jury, on the ground that in Scotland, where the debt arose, the case would have been tried by a judge alone."

An insurance transaction more often than not have links with more than one country. In a given case for resolution of a complex question the principles of private inter-national law or the conflict of laws may have to be turned to but with a view to determine the same, disputes have to be resolved by reference to the system of law which governs the contract of insurance. The jurisdiction to deal with an action by or against insurers in England and EC Member States except Denmark are now governed by EC Council Regulation No. 44/2001. In other countries, however, the law which is prevailing therein would govern the field. It may be true that some conventions like Brussels and Lugano are no longer relevant in most cases involving EC Member States but they form an important part of the background to the current jurisdictional regime. For defending the limits of the jurisdiction of the case of a particular

company the same must, therefore, be governed by the law prevailing therein. The claim may be a maritime claim in a non-contracting country but not in others. The 'Club' in law, therefore, would be entitled to enforce its claims against the 'Vessel' keeping in view the law prevailing in India within whose territorial jurisdiction the ship is found. Only because, the claim can be enforced in our country and not in some other countries, by itself would not lead to the conclusion that it cannot be enforced at all irrespective of the domestic law.

Some countries like Canada, Australia and South Africa as well as communist regimes like China and Korea have made statutes as a result whereof the maritime claims stand codified. The expression 'necessaries' is not used in the said statutes except the statutes of United States. The domestic legislation indisputably will prevail over any international convention irrespective of the fact as to whether the country concerned is a party thereto or not.

The rules for ship arrest in international fora are not uniform. Despite International Convention on the Arrest of Sea-going Ships 1952 as amended in the year 1999 either having been adopted by some countries or adopted by others, the law is enforced by the concerned countries having regard to their own domestic legal system. Where, how and when can a maritime claimant most advisedly arrest a ship in pursuit of its claim either in rem or in personem had all along been a complicated question keeping in view the principles of 'lex fori'.

As a matter of policy legislation or otherwise England did not want that arrears of insurance premium should be included as a maritime claim, but the same would not imply that in other countries despite the unpaid insurance premium being maritime claim, the same would not be enforced.

SUMMARY OF THE DISCUSSIONS:

The discussions made hereinbefore lead to the conclusion that having regard to the changing scenario and keeping in tune with the changes in both domestic and international law as also the statutes adopted by several countries, a stand, however, bold, may have to be taken that unpaid insurance premium of P&I Club would come within the purview of the expression "Necessaries supplied to any ship". Other types of insurance, keeping in view the existing statutes may not amount to a "necessary". In any event, such a question, we are not called upon to answer at present. The discussions made hereinbefore under different sub-titles of this judgment separately and distinctly may not lead us to the said conclusion but the cumulative effect of the findings thereunder makes the conclusion inevitable. The question has not only been considered from the angle of history of the judicial decisions rendered by different Courts having great persuasive value but also from the angle that with the change in time interpretative changes are required to be made. We, therefore, in agreement with the judgment of the Bombay High Court, hold that unpaid insurance premium being a maritime claim would be enforceable in India.

MAINTAINABILIY OF THE LETTERS PATENT APPEAL:

Submission of Mr. Pratap is that by refusing to exercise discretion to reject a plaint by account, no right or liability of the party is decided and by reason thereof the procedure for determining the rights and obligations of the parties are only set in motion. Such an order would akin to an order admitting the plaint, Mr. Pratap would submit. Reliance in this connection has been placed on The Justices of the Peace for Calcutta Vs. Oriental Gas Company [1872 Vol. VIII Bengal Law Reports 433 at 452].

It was urged that by not rejecting the plaint the defences set out by the defendant are not obliterated as they will be entitled to raise

all such contentions at the trial. Reliance in this connection has been placed on Prahladrai Agarwalla Vs. Shri Renuka Pal [AIR 1982 Cal 259 at page 266].

Mr. Pratap would further contend that the High Court has misread and misinterpreted the decision of this Court in Shah Babulal Khimji Vs. Jayaben Kania [(1981) 4 SCC 8]

By way of an analogy, the learned counsel would argue that leave to defend a suit granted in favour of the defendant under Order 37 of the Code of Civil Procedure would not be a 'judgment' within the meaning of Clause 15 of the Letter Patent being an interlocutory order as damage or prejudice in such a matter to the defendant must be a direct and immediate one.

Clause 15 permits an appeal against the order passed by a Single Judge of the High Court in the second forum.

The relevant portion of Clause 15 of the Letters Patent reads thus:

"And we do further ordain that an appeal shall lie to the said High Court of Judicature at Madras, Bombay, Fort William in Bengal from the judgment ... of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made (on or after the first day of February 1929) in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal."

The right of appeal which is provided under Clause 15 of the Letters Patent cannot be said to be restricted.

In Subal Paul v. Malina Paul and Anr. [JT 2003 (5) SC 193] this Court held:

"While determining the question as regards Clause 15 of the Letters Patent the court is required to see as to whether the order sought to be appealed against is a judgment within the meaning thereof or not. Once it is held that irrespective of the nature of the order, meaning thereby whether interlocutory or final, a judgment has been rendered, Clause 15 of the Letters Patent would be attracted.
The Supreme Court in Shah Babulal Khimji's case (supra) deprecated a very narrow interpretation on the word 'judgment' within the meaning of Clause 15.
This Court said:
"a court is not justified in interpreting a legal term which amounts to a complete distortion of the word 'judgment' so as to deny appeals even against unjust orders to

litigants having genuine grievances so as to make them scapegoats in the garb of protecting vexatious appeals. In such cases, a just balance must be struck so as to advance the objection of the statute and give the desired relief to the litigants, if possible."

In Shah Babulal Khimji's case (supra), this Court in no uncertain terms referred to the judgment under the Special Act which confers additional jurisdiction to the High Court even in internal appeal from an order passed by the Trial Judge to a larger Bench. Letters Patent has the force of law. It is no longer res integra. Clause 15 of the Letters Patent confers a right of appeal on a litigant against any judgment passed under any Act unless the same is expressly excluded. Clause 15 may be subject to an Act but when it is not so subject to the special provision the power and jurisdiction of the High Court under Clause 15 to entertain any appeal from a judgment would be effective.

The decision of this Court in Shah Babulal Khimji's case (supra) has been considered in some details by a Special Bench of the Calcutta High Court in Tanusree Art Printers and Anr. v. Rabindra Nath Pal [2000 (2) CHN 213 and 2000 (2) CHN 843]. It was pointed out:

"If the right of appeal is a creature of a statute, the same would be governed by the said statute. Whether an appeal under Clause 15 of the Letters patent will be maintainable or not when the matter is governed by a Special Statute will also have to be judged from the scheme thereof. (e.g. despite absence of bar, a Letters Patent appeal will not be maintainable from a judgment of the learned Single Judge rendered under the Representation of People Act.)"

It was pointed out that in Shah Babulal Khimji's case (supra) this Court posed three questions namely:

"1) Whether in view of Clause 15 of the Letters Patent an appeal under Section 104 of the Code of Civil Procedure would lie? 2) Whether Clause 15 of the Letters Patent supersedes Order 43, Rule 1 of the Code of Civil Procedure? 3) Even Section 104 of the CPC has no application, whether an order refusing to grant injunction or appoint a receiver would be a judgment within the meaning of Clause 15 of the Letters Patent?"

The Apex Court answered each of them from a different angle:

a) Section 104 of the Code of Civil Procedure read with Order 43, Rule 1 expressly authorizes a forum of appeal against orders falling under various clauses of Order 43 Rule 1 to a Larger Bench of a High Court without at all disturbing interference with or overriding the Letters Patent jurisdiction.

b) Having regard to the provisions of

Section 117 and Order 49 Rule 3 of the Code of Civil Procedure which excludes various other provisions from the jurisdiction of the High Court, it does not exclude Order 43 Rule 1 of the CPC.
c) There is no inconsistency between Section 104 read with Order 43 Rule 1 and the appeals under Letters Patent, as Letters Patent in any way does not exclude or override the application under Section 104 read with Order 43 Rule 1 which shows that these provisions would not apply in internal appeals within the High Court."
In Prataprai N. Kothari v. John Braganza [(1999) 4 SCC 403], even in a suit for possession only not based on title, a letters patent appeal was held to be maintainable.
The decision of this Court in Sharda Devi v. State of Bihar [(2002) 3 SCC 705] is also to the same effect, wherein in para 9 it was held:
"A Letters patent is the charter under which the High Court is established. The powers given to a High Court under the Letters Patent are akin to the constitutional powers of a High Court. Thus when a Letters Patent grants to the High Court a power of appeal, against a judgment of a Single Judge, the right to entertain the appeal would not get excluded unless the statutory enactment concerned excludes an appeal under the Letters Patent."
Section 54 of the Land Acquisition Act, 1894 provides for an appeal before the High Court and thereafter to the Supreme Court and despite the same it was held that a letters patent appeal under Clause 15 would be maintainable."

The view taken by the Calcutta and Bombay High Court that an order passed in terms of Order 37 of the Code of Civil Procedure granting leave to defend would not be a judgment within the meaning of Clause 15 of the Letters Patent may not be of much relevance.

In M/s. Tanusree Art Printers & Anr. Vs. Rabindra Nath Pal [2000 (2) CHN 213] it has been noticed:

"In M/s. Merchants of Traders (P) Ltd. Vs. M/s. Sarmon Pvt. Ltd., reported in 1997(1) CHN 287, learned Division Bench although did not consider this aspect of the matter but held that an order passed in terms of Order 37 Rule 5 of the Code of Civil Procedure will not be appealable."

Reliance by Mr. Pratap upon a decision of the Calcutta High Court in Prahladrai Agarwalla and others Vs. Smt. Renuka Pal and Others [AIR 1982 Cal. 259] wherein it has been held that an order under Order 7 Rule 11 of the Code of Civil Procedure refusing to reject a plaint is not a judgment, is not apposite.

In the said judgment, however, the judgment of this Court in Shah Babulal Khimji (supra) was not taken into consideration. The ratio of the decision of this Court in Shah Babulal Khimji, as regard scope and ambit of the word "judgment" had not been noticed by the Calcutta High Court.

The submission, however, to the effect that in the suit all defences would be open to the defendant, in our opinion, is misconceived inasmuch as, no evidence can be adduced in absence of any pleading. There may not, furthermore be any requirement to go into the trial if the plaint does not disclose a cause of action.

The contention that an order refusing to reject a plaint is one akin to order amending the plaint would not be a correct proposition of law.

The question as to whether the defendant despite such an order refusing to reject a plaint will have a right to show that the case is false would again be of no consequence. The said submission, in our opinion, is based on a wrong premise.

An order refusing to grant leave to a defendant to defend the suit would be passed when it is found that the defence is a moonshine.

Clause 15 of the Letters Patent is not a special statute. Only in a case where there exists an express prohibition in the matter of maintainability of an intra court appeal, the same may not be held to be maintainable. But in the event there does not exist any such prohibition and if the Order will otherwise be a 'judgment' within the meaning of Clause 15 of the Letters Patent, an appeal shall be maintainable.

What would be a judgment is stated in Shah Babulal Khimji (supra) as under:

"We think that "judgment" in Clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined.
81. An analysis of the observations of the Chief Justice would reveal that the following tests were laid down by him in order to decide whether or not an order passed by the Trial Judge would be a judgment :
(1) a decision which affects the merits of the question between the parties;
(2) by determining some right or liability;
(3) the order determining the right or liability may be final, preliminary or interlocutory, but the determination must be final or one which decides even a part of the controversy finally leaving other matters to be decided later.

In Lea Badin Vs. Upendra Mohan Roy [AIR 1935 Cal. 35], the Calcutta High Court held that an order refusing to appoint a receiver is determinative of a right of the plaintiff and would accordingly be a judgment.

Yet again in Chittaranjan Mondal Vs. Sankar Prosad Sahani [AIR 1972 Cal. 469] the Calcutta High Court held that an order refusing to grant an injunction restraining execution of the judgment-debtor was a judgment within the meaning of Clause 15.

As by reason of an order passed under Order 7, Rule 11 of the Code

of Civil Procedure, the rights conferred upon the parties are determined one way or the other, stricto sensu it would not be an interlocutory order but having regard to its traits and trappings would be a preliminary judgment.

It is true that in Shah Babulal Khimji (supra) it is stated that an order rejecting the plaint would be appealable but does not expressly state that an order refusing to reject would not be appealable. Therein this Court gave 15 instances where an order would be appealable which are only illustrative in nature.

Such observations have to be understood having regard to the concept of finality which are of three types:

(1) a final judgment
(2) a preliminary judgment and
(3) intermediary or interlocutory judgment.

In our opinion the order refusing to reject the plaint falls in the category of a preliminary judgment and is covered by the second category carved out by this Court.

It is trite that a party should not be unnecessarily harassed in a suit. An order refusing to reject a plaint will finally determine his right in terms of Order 7 Rule 11 of the Code of Civil Procedure.

The idea underlying Order 7 Rule 11A is that when no cause of action is disclosed, the courts will not unnecessarily protract the hearing of a suit. Having regard to the changes in the legislative policy as adumbrated by the amendments carried out in the Code of Civil Procedure, the Courts would interpret the provisions in such a manner so as to save expenses, achieve expedition, avoid the court's resources being used up on cases which will serve no useful purpose. A litigation which in the opinion of the court is doomed to fail would not further be allowed to be used as a device to harass a litigant. (See Azhar Hussain Vs. Rajiv Gandhi 1986 Supp SCC 315 at 324-35).

In Dhartipakar Aggarwal Vs. Rajiv Gandhi [1987 Supp SCC 93], this court held:
"9. In K. Kamaraja Nadar v. Kunju Thevar (1959 SCR 583 : AIR 1958 SC 687 : 14 ELR 270), the Election Tribunal and the High Court both refused to consider preliminary objections raised by the returned candidate at the initial stage on the ground that the same would be considered at the trial of the election petition. This Court set aside the order and directed that the preliminary objection should be entertained and a decision reached thereupon before further proceedings were taken in the election petition. Bhagwati, J. speaking for the Court observed thus :
We are of opinion that both the Election Tribunal and the High Court were wrong in the view they took. If the preliminary objection was not entertained and a decision reached thereupon, further proceedings taken in the election petition would mean a full-fledged trial involving examination of a large number of witnesses on behalf of the second respondent in support of the numerous allegations of corrupt practices attributed by him to the appellant, his agents or others working on his behalf; examination of a large number of witness by or on behalf of the appellant controverting the

allegations made against him; examination of witness in support of the recrimination submitted by the appellant against the second respondent; and a large number of visits by the appellant from distant places like Delhi and Bombay to Ranchi resulting in not only heavy expenses and loss of time and diversion of the appellant from his public duty in the various fields of activity including those in the House of the People. It would mean unnecessary harassment and expenses for the appellant which could certainly be avoided if the preliminary objection urged by him was decided at the initial stage by the Election Tribunal.

It was opined that in a given case a full dressed trial need not be undertaken.

Yet again in Samar Singh Vs. Kedar Nath (1987 Suppl. SCC 224) it has been held :

"In substance, the argument is that the court must proceed with the trial, record the evidence, and only after the trial of the election petition is concluded that the powers under the Code of Civil Procedure for dealing appropriately with the defective petition which does not disclose cause of action should be exercised. With respect to the learned counsel, it is an argument which it is difficult to comprehend. The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent."

We may notice a converse case. In Dipak Chandra Ruhidas Vs. Chandan Kumar Sarkar [(2003) 7 SCC 66], in view of Section 98 (a) and Section 116-A of the Representation of People Act, a question arose as to whether dismissing an election petition at the threshold shall be appealable. This Court observed:

"13. Furthermore, Section 86 deals with trial of election petitions, Sub-section (1) whereof is a part of it. Trial has not been defined. In Black's Law Dictionary at page 1348 it is stated:
"A judicial examination and determination of issues between parties to action, Gulf, C. & S.F. Ry. Co. v. Smit, Okl., 270 P.2d 629, 633; whether they be issues of law or of fact, Pulaski v. State, 23 Wis. 2d 138, 126 N.W. 2d 625, 628. A judicial examination, in accordance with law of the land, of a cause, either civil or criminal, of the issues between the parties whether of law or fact, before a court that has proper jurisdiction".
14. It is, therefore, not necessary that the trial must be a full dressed or a jury trial or a trial which concludes only after taking evidence of a parties in support of their respective cases.
15. Section 116A provides for an appeal. The said provision must be given a liberal and purposive construction. The scope of an appeal

should be held to be wider than an application for judicial review or a petition under Article 136 of the Constitution of India.
16. Furthermore, the Representation of the People Act provides for a complete machinery. The right of appeal conferred upon a suitor must be considered from that angle. When an order is passed under Section 98 of the Act, the same may be in terms of either Sub-section (1) of Section 86 or otherwise. An appeal lies against a final order. An order passed under Sub-section (1) of Section 86 is also final. It may be that in the event an appeal therefrom is allowed, the matter may be required to be sent back but that would not render an order passed thereunder as an interlocutory one. It does not take away the concept of the finality attached therewith."

In Central Mine Planning and Design Institute Ltd. Vs. Union of India and Another [(2001) 2 SCC 588] this Court upon referring Shah Babulal Khimji (supra) held:

"Adverting to the facts of this case, Section 17-B of the ID Act confers valuable rights on the workmen and correspondingly imposes onerous obligations on the employer. The order in question passed by the learned Single Judge determines the entitlement of the workmen to receive benefits and imposes an obligation on the appellant to pay such benefits provided in the said section. That order cannot but be "judgment" within the meaning of clause 10 of Letters Patent, Patna. The High Court is obviously in error in holding that the said order is not judgment within the meaning of clause 10 of the Letters Patent of Patna."

We, therefore, are of the opinion that Letters Patent Appeal was maintainable.

REJECTION OF PLAINT:

Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in its entirety, a decree would be passed.

CAUSE OF ACTION:

A cause of action is a bundle of facts which are required to be pleaded and proved for the purpose of obtaining relief claimed in the suit. For the aforementioned purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence.

Order 7 Rule 14 of the Code of Civil Procedure provides as follows:

"14 PRODUCTION OF DOCUMENT ON WHICH PLAINTIFF SUES OR RELIES.
(1) Where a plaintiff sues upon a document or relies upon document in his possession or power

in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.
(2) Where any such document is not in the possession or power of the plaintiff, he shall, where possible, state in whose possession or power it is.
(3) Where a document or a copy thereof is not filed with the plaint under this rule, it shall not be allowed to be received in evidence on behalf of the plaintiff at the hearing of the suit.
(4) Nothing in this rule shall apply to document produced for the cross-examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

In the instant case the 'Club' not only annexed certain documents with the plaint but also filed a large number of documents therewith. Those documents having regard to Order 7 Rule 14 of the Code of Civil Procedure are required to be taken into consideration for the purpose of disposal of application under Order 7 Rule 11(a) of the Code of Civil Procedure. The 'Club' in its plaint pleaded:

"The Plaintiff is a Protection & Indemnity Association incorporated under the laws of the United Kingdom and carries on business through its Managers, Liverpool & London P&I Management Ltd. at Liverpool, UK. The Plaintiff is a mutual association of ship-owners and offers insurance cover in respect of vessels entered with it for diverse third party risks associated with the operation and trading of vessels. This insurance is commonly known as Protection & Indemnity (P&I) cover in respect of various risks associated with the vessels in their maritime adventure. The 1st Defendant vessel m.v. "Sea Success I" is a sistership of the vessels "Sea Ranger" and "Sea Glory" which were entered for P&I risks with the Plaintiff Association. The said two vessels were entered into the Plaintiff's Association for the policy year 1999-2000 by Defendant No. 2, Singapore Soviet Shipping Co. Pte. Ltd. who, as per the terms of the insurance and Rules of the Plaintiff Association, were recognized and considered to be the owners of the said two vessels and the assured under the policy of insurance. The 1st Defendant vessel is owned and/ or controlled by Defendant No. 2 through its wholly owned 100% subsidiary, Singapore Soviet Shipping Corporation Inc., Monrovia. The 1st Defendant vessel is presently at the port and harbour of Mumbai within the territorial waters of India and within the Admiralty jurisdiction of this Hon'ble Court. The 2nd Defendant is the owner of the 1st Defendant and is also inter alia the party liable in personam in respect of the Plaintiff's claim.

The Plaintiff submits as more particularly stated in paragraph 1 above, that the 1st Defendant vessel is a sistership of the two

vessels "Sea Glory" and "Sea Ranger" in view of the beneficial ownership, management of all three vessels having vested in Defendant No. 2. The Plaintiff further submits that Defendant No. 2 is liable in personam in respect of the unpaid insurance premium in respect of the two vessels "Sea Glory" and "Sea Ranger". Consequently, the Plaintiff is entitled to arrest any other vessel in the ownership of Defendant No. 2. The 1st Defendant vessel is owned by Defendant No. 2 through it's 100% subsidiary S.S. Shipping Co. Inc. In the circumstances, the Plaintiff submits that they are entitled to proceed against the Defendant vessel in rem and are entitled to an order of arrest, detention and sale of the vessel for recovery of their outstanding dues in respect of insurance premium as more particularly stated above. The Plaintiff is, therefore, entitled to have the Defendant vessel along with her hull, gear, engines, tackle, machinery, bunkers, plant, apparel, furniture, equipments and all appurtenances thereto condemned and arrested under a warrant of arrest of this Hon'ble Court for realization of the Plaintiff's dues. The Plaintiff is further entitled to have the Defendant vessel sold under the orders and directions of this Hon'ble Court and to have the sale proceeds thereof applied towards the satisfaction of the Plaintiff's claim in the suit. The Plaintiff is entitled to an order of arrest of the Defendant vessel as arrest is the only method of proceeding against the said vessel in rem. The Plaintiff submits that if such an order of arrest is not granted, irreparable harm and injury will be caused to the Plaintiff inasmuch as the Plaintiff's suit will be rendered infructuous. There is no other alternative efficacious remedy available to the Plaintiff.

The Club has pleaded that the vessel is a sister ship of 'Sea Ranger' and 'Sea Glory' owned and possessed by the second defendant. The Club has also pleaded that the defendant No. 2 is beneficial owner of the first defendant ship. Determination on such assertions would amount to determination of question of fact. If the 'Vessel' denies or disputes the same; an issue in that behalf will have to be framed and decided.

Beneficial ownership of a ship is not a question of fact alone. It is a mixed question of fact and law. In William Vs. Wilcox [(1838) 8 Ad. & EL 331] it is held:

"It is an elementary rule in pleading that when a state of facts is relied, it is enough to allege it simply, without setting out the subordinate facts which are the means of proving it or the evidence sustaining the allegations."

The aforementioned dicta has been quoted with approval in Mohan Rawale Vs. Damodar Tatyaba & Ors. [(1994) 2 SCC 392].

It may be true that Order 7 Rule 11(a) although authorises the

court to reject a plaint on failure on the part of the plaintiff to disclose a cause of action but the same would not mean that the averments made therein or a document upon which reliance has been placed although discloses a cause of action, the plaint would be rejected on the ground that such averments are not sufficient to prove the facts stated therein for the purpose of obtaining reliefs claimed in the suit. The approach adopted by the High Court, in this behalf, in our opinion, is not correct.

In D. Ramachandran Vs. R.V. Janakiraman & Ors. [(1999) 3 SCC 267], this Court held:

"It is well settled that in all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the court has to find out whether those averments disclose a cause of action or a triable issue as such. The court cannot probe into the facts on the basis of the controversy raised in the counter."

Furthermore a fact which is within the special knowledge of the defendant need not be pleaded in the plaint. In Punit Rai vs. Dinesh Chaudhary [JT 2003 (Supp.1) SC 557], it is stated:

"...These are the material facts relating to the plea raised by the appellant that the respondent is not a Scheduled caste. We don't think if the respondent means to say that the petitoner should have stated in the petition that the respondent is not born of Deo Kumari Devi said to be married to Bhagwan Singh in village Adai. If at all these facts would be in the special knowledge of respondent, Bhagwan Singh and Deo Kumari Devi hence not required to be pleaded in the election petition. It is not possible as well. In this connection, a reference may be made to a decision of this Court in Balwan Singh vs. Lakshmi Nrain and Ors {AIR 1960 SC 770). This case also relates to election matter and it was held that facts which are in the special knowledge of the other party could not be pleaded by the election petitioner. It was found that particulars of the arrangement of hiring or procuring a vehicle would never be in the knowledge of the petitioner, such facts need not and cannot be pleaded in the petition."

In D. Ramachandran Vs. R.V. Janakiraman & Ors. [1999] 3 SCC 267, it has been held that the Court cannot dissect the pleading into several parts and consider whether each one of them discloses a cause of action.

In the aforementioned backdrop, the question as to whether the Club had been able to show that the Respondent No. 1 is a sister ship of "Sea Glory" and "Sea Ranger" admittedly belonging to the first respondent is a matter which is required to be gone into in the suit.

In ascertaining whether the plaint shows a cause of action, the court is not required to make an elaborate enquiry into doubtful or

complicated questions of law or fact. By the statute the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is shown. In Vijay Pratap Singh Vs. Dukh Haran Nath Singh [AIR 1962 SC 941] this Court held:

"By the express terms of r. 5 clause (d), the court is concerned the ascertain whether the allegations made in the petition show a cause of action. The court has not to see whether the claim made by the petitioner is likely to succeed: it has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. If accepting those allegations as true no case is made out for granting relief no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action the court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences which the defendant may raise upon the merits; nor is the court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. If the allegations in the petition, prima facie, show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him."

So long as the claim discloses some cause of action or raises some questions fit to be decided by a Judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. The purported failure of the pleadings to disclose a cause of action is distinct from the absence of full particulars. [See Mohan Rawale (supra)]

Beneficial ownership is not a pure question of fact. It is a mixed question of law and fact. In that view of the matter it was not necessary for the Club to set out the subordinate facts which arte means of proving it or the evidence sustaining the allegations. The High Court, however, in its order rejecting the plaint held:

"We have not gone into the merits of the Defendant No. 1 ship, we clarify, on the basis of any averments made by Defendant No. 1, to the contrary, but we have proceeded to examine the same on the basis of the averments made in the plaint to find out whether, as they stand, prove the Defendant No. 1 vessel Sea Success -I to be sister ship of vessels - "Sea Glory" and "Sea Ranger" being beneficially owned by Defendant No. 2. We have already indicated above that the allegations made in the plaint by themselves do not prove factum of Defendant No. 1 Sea Success-I being sister ship of vessels "Sea Glory" and "Sea Ranger" in respect of whom the claim has been raised in the suit, we find it difficult to approve the view of the learned Single Judge in this regard. It cannot be overlooked that ship is a valuable commercial chattel and her arrest undeservingly severely prejudices third parties innocently as well as affect the interest of

owner, crew member, cargo owner, shipper etc. adversely and, therefore, it is all the more necessary to analyse the plaint meaningfully at the threshold to find out whether it discloses cause of action or not and not on technical and formal reading that if discloses cause of action and wait for trial."

The approach of the High Court, in our considered opinion, is not correct. For the purpose of rejecting a plaint it is not necessary to consider whether the averments made in the plaint prove the factum that the defendant No. 1 "Sea Success-I" is a sister ship of "Sea Glory" and "Sea Ranger" or the said two ships are beneficially owned by the defendant No. 2. The reasons which have been assigned in support of the said aforementioned finding that that the ship is a valuable commercial chattel and her arrest undeservingly prejudices third parties as well as affect the interest of owner and others is a question which must be gone into when passing a final order as regard interim arrest of ship or otherwise. For the aforementioned purpose the Vessel herein could file an application for vacation of stay. While considering such an application, the Court was entitled to consider not only a prima facie case but also the elements of balance of convenience and irreparable injury involved in the matter. In such a situation and particularly when both the parties disclose their documents which are in their possession, the Court would be in a position to ascertain even prima facie as to whether the Club has been able to make out that "Sea Glory" and "Sea Ranger" are sister vessels of the "Vessel".

The reason for the aforementioned conclusion is that if a legal question is raised by the defendant in the written statement, it does not mean that the same has to be decided only by way of an application under Order 7 Rule 11 of the Code of Civil Procedure which may amount to pre-judging the matter.

Furthermore, the question as to whether the asset of a 100% subsidy can be treated as an asset of the parent company would again depend upon the fact situation of each case.

In The Aventicum [1978] 1 Lloyd’s L.R. it has been held:

"I have no doubt that on a motion of this kind it is right to investigate the true beneficial ownership. I reject any suggestion that it is impossible "to pierce the corporate veil". I of course remember, as Mr. Howard urges, the case of Saloman v. Saloman & Co., [1897] A.C. 22, but of course it is plain that s.3(4) of the Act intends that the Court shall not be limited to a consideration of who is the registered owner or who is the person having legal ownership of the shares in the ship; the directions are to look at the beneficial ownership. Certainly in a case where there is a suggestion of a trusteeship or a nominee holding, there is no doubt that the Court can investigate it. I think that it may well be, without having to resolve the difference of opinion expressed by Mr. Justice Brandon and Mr. Justice Goff in the two cases to which I have referred that the Court has the power and should in some cases look even further."

Yet again in The Andrea Ursula [1971] 1 Lloyd’s L.R. 145, the Court opined:

"There is no definition in the Act of the expression "beneficially owned" as used in sect. 3(4). It could mean owned by someone who, whether he is the legal owner or not, is in any case the equitable owner. That would cover both the case of a ship the legal and equitable title to which are in one person, A, and also the case of a ship the legal title to which is in one person, A, but the equitable title to which is in another person, B. In the first case the ship would be beneficially owned by A, and in the second case by B. Trusts of ships, express or implied, are however, rare and the words seem to me to be capable also of a different and more practical meaning related not to title, legal or equitable, but to lawful possession and control with the use and benefit which are derived from them. If that meaning were right, a ship would be beneficially owned by a person who, whether he was the legal or equitable owner or not, lawfully had full possession and control of her, and, by virtue of such possession and control, had all the benefit and use of her which a legal or equitable owner would ordinarily have."

Furthermore, the question as to whether the concept of ownership of a ship which has been introduced in 18th Century when there had been no joint stock companies and the concept of shares in a ship so as to encourage the individuals to pool their resources by a sister ship so that they may become co-owners is a matter which is required to be considered at an appropriate stage. We do not think that such a question can justifiably be gone into at this stage.

We do not intend to delve deep into the questions as to whether the two ships named hereinabove are the sister ships of the respondent No. 1 Vessel or whether the requirement of law as regard ownership of a ship in the Respondent No. 1 as beneficial owner has been fulfilled or not. Such issues must be considered at an appropriate stage.

CONCLUSION :

We, therefore, direct that in the event, a proper application is filed either for dissolution of the interim order of injunction passed by the learned Single Judge or if the High Court in its wisdom thinks fit to decide any issue as a preliminary issue such questions may be gone into in greater details. Any observations made by us must be considered to have been made only for the purpose of disposal of these appeals and not for the purpose of determining the merit of the matter. However, having regard to the facts and circumstances of this case, we will request the High Court to consider the desirability of disposing of the matter as expeditiously as possible and preferably within a period of three months from the date of receipt of a copy of this order.

For the reasons aforementioned, the judgment under challenge is set aside and the matter is sent back to the High Court. Civil Appeal No. 5665 of 2002 is accordingly allowed and Civil Appeal No. 5666 of 2002 is dismissed. No costs.